

FOR ARGUMENT

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-316

JOHN R. BATES and VAN O'STEEN,

Appellants,

v.

STATE BAR OF ARIZONA,

Appellee.

On Appeal from the Supreme Court
of the State of Arizona

BRIEF ON THE MERITS OF *AMICUS CURIAE*,
ARIZONA CREDIT UNION LEAGUE, INC.

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INTEREST OF AMICUS

Amicus, Arizona Credit Union League, Inc., (hereinafter "League") is a voluntary, nonprofit association of 160 Arizona credit unions with an approximate membership of 425,000 Arizona citizens.

The League sponsors on a statewide basis a group legal service program known as Family Legal Services. To date, 77 credit unions have contracted with a Phoenix law firm to pro-

vide group legal services to the credit unions' membership and over 3,300 credit union members have chosen to participate in the Family Legal Service program.

For an annual fee of \$25.00, the Family Legal Service program entitles the credit union member and his family to an unlimited number of telephone consultations throughout the membership year. The telephone consultation includes telephone contact and letter writing by the attorney in order to resolve the member's problem. If the legal problem cannot be resolved by virtue of the telephone consultation, the credit union member is referred to an attorney in the member's geographical area. Referrals generally involve legal matters which are listed on a guaranteed, fixed fee schedule covering such areas as domestic relations, wills, real estate, probate, traffic and consumer matters.

The League believes that its group legal service program provides credit union members with immediate access to qualified attorneys at a fee which its membership can afford.

Amicus is vitally interested in the outcome of this case. It is essential for the success of the Family Legal Service program that credit unions be able to communicate with their members concerning the benefits of this program.

Amicus takes the position that the decision in this case should not affect the clear and unfettered constitutional right which groups have to communicate freely with their membership.

Amicus has received the written consent of all parties in this case to file a brief on the merits and request is made that this Court enter an appropriate order in this regard.

SUMMARY OF ARGUMENT

The League sponsors a group legal service program known as Family Legal Services with over 3,300 families presently participating. Essential to the success and development of this program is the unrestricted ability of the League and its associated credit unions to promote to its membership the availability of the program, including its emphasis on preventive law, the cost of legal services and the competency of counsel.

It is the position of Amicus that a distinction exists between lawyer advertising and group communication, namely, the former being commercial speech and the latter being non-commercial. While lawyer advertising involves no more than proposing a commercial transaction in regard to the selling of legal services, it is clear that the decision in *NAACP v. Button*,

371 U.S. 415 (1963), *Brotherhood of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964), *United Mine Workers v. Illinois State Bar Assn.*, 389 U.S. 217 (1967) and *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 (1971), indicate a First Amendment protection for collective activity and communication undertaken for the purpose of obtaining meaningful access to the courts and enabling families to obtain affordable and competent legal representation.

The difference between commercial and noncommercial speech also is important to the related issue of regulation. Amicus contends that lawyer advertising could be subject constitutionally to more regulation than group communication.

Finally, if the court continues the prohibition against lawyer advertising, Amicus is concerned with the possible spillover effect regarding the ability of groups to communicate effectively with their membership. The history of group legal services illustrates the obstacles which the organized bar has placed in the path of its development. Even if the Court takes the position that lawyer advertising is impermissible, Amicus would hope that recognition be continued regarding the First Amendment protection afforded to group legal service communication.

ARGUMENT

LAWYER ADVERTISING DIFFERS FROM GROUP COMMUNICATION REGARDING FIRST AMENDMENT PROTECTION

1. The Appellants and particularly Amici Curiae, Consumers Union of United States, Inc., Public Citizen, Inc. and the National Consumer Center For Legal Services, argue that commercial lawyer advertising is similar to group legal service communication and, therefore, enjoys constitutional protection under the authority of *Button, Trainmen, United Mine Workers* and *United Transportation Union, supra*.

While Amicus does not disagree with Appellants' claim to a constitutional right to advertise, Amicus strongly objects to the contention of Appellants and Amici Curiae that lawyer advertising and group communication are constitutionally similar. This Court has stated:

"Regardless of the particular label asserted by the State — whether it calls speech 'commercial' or 'commercial advertising' or 'solicitation' — a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation. The diverse motives, means, and messages of advertising may make speech 'commercial' in widely varying degrees." *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975).

The Appellants clearly were selling to the public x legal ser-

vices at y prices and were doing no more than proposing a commercial transaction. See *Pittsburgh Press Co. v. Pittsburgh Comm's on Human Relations*, 413 U.S. 376, 385 (1973).

Last term this Court recognized that advertising the price of prescription drugs was "commercial speech" and protected by the First Amendment. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 96 S.Ct. 1817 (1976). However, the majority opinion in *Virginia State Board of Pharmacy, supra*, also indicated that other varieties of speech were noncommercial in nature even though:

"money is spent to project it, as in a paid advertisement of one form or another *New York Times Co. v. Sullivan*, 376 U.S., at 266 . . . even though it is carried in a form that is "sold" for profit . . . and even though it may involve a solicitation to purchase or otherwise pay or contribute money *New York Times Co. v. Sullivan, supra*; *NAACP v. Button*, 371 U.S. 415, 429 . . ." (other citations omitted). *Virginia State Board of Pharmacy, supra*, 96 S.Ct. at 1825.

Amicus contends that a group's communication to its members concerning legal services is clearly noncommercial speech. This Court repeatedly has recognized the right of individuals to assemble and to petition for a redress of grievances and has stated specifically concerning group legal services:

"The common thread running through our decisions in *NAACP v. Button*, *Trainmen*, and

United Mine Workers is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment. However, that right would be a hollow promise if courts could deny associations of workers or others the means of enabling their members to meet the costs of legal representation." *United Transportation Union, supra*, 401 U.S. at 585-586.

The communication between the credit union and its members concerning Family Legal Services is fundamental to the program's objectives of apprising members of their legal rights¹ and in assisting families in obtaining affordable and competent legal representation.²

¹ A related objective is educating credit union members to behave more knowledgeably in legal affairs. The most obvious area in which credit union members should become knowledgeable concerns real estate transactions. Unfortunately, Arizona citizens have been the victim of widespread land fraud and credit union members have lost much of their limited savings through land fraud schemes. It is of some interest to note that the Attorney General of the State of Arizona issued an opinion on June 10, 1976, which indicated that student legal services were related to the educational needs of students for the reason that in part the program would help the students "achieve good citizenship by enabling them to behave more knowledgeably in legal affairs." Att. General Op. # R76-122.

² Arizona Revised Statutes § 6-501 (2) defines credit union as: "A 'credit union' is a cooperative nonprofit society, association or group organized and incorporated in accordance with the provisions of this chapter, for the purposes of creating thrift and self-reliance among its members and to make credit available to people of small means, through a system of cooperative lending at a reasonable and legitimate rate of interest in order to improve their economic and social condition."

United States Code Annotated § 12-1752 (1) states: "Federal Credit Union means a cooperative association organized in accordance with the provisions of this Chapter for the purpose of promoting thrift among its members and creating a source of credit for provident or productive purposes."

As professor Archibald Cox has stated:

"... [T]he unfilled need for legal services would seem to center about two difficulties which it may be impossible to overcome without changes in the organization, or structure, of the legal profession and, incidentally, in some of the canons of ethics. The first difficulty is the inability of individuals to meet the high cost of the legal services that they occasionally require Second, and possibly more important, is the problem of ignorance. The ignorance is of two kinds; first, ignorance of the possibility that legal advice might be helpful and legal remedies may be available; second, distrust of strange lawyers and ignorance as to whether and where reliable legal services can be obtained either without cost or with the limited ability to pay. . . ." A. Cox, *Poverty and the Legal Profession*, 54 Ill. B.J. 12, 14-15 (1965).

In recognition of the fact that meaningful access to the courts is a fundamental right,³ this Court has ruled that groups have a constitutional right to contact their members about their legal rights and advise them concerning a reliable lawyer. As the Court stated in *Brotherhood of Railroad Trainmen, supra*, 377 U.S. 5-6:

"It cannot be seriously doubted that the First Amendment's guarantees of free speech, peti-

³ Barlow Christensen in *Lawyers For People Of Moderate Means* (Chicago, American Bar Association, 1970), at page 5, footnote 4, estimates that there are 140,000,000 Americans of moderate means (those with incomes between \$5,000 and \$15,000) and that the members of this group are unable to afford standard legal fees for some or all of their legal problems.

tion and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them in the Safety Appliance Act and the Federal Employers' Liability Act, statutory rights which would be in vain and futile if the workers could not talk together freely as to the best course to follow. The right of members to consult with each other in a fraternal organization necessarily includes the right to select a spokesman from their number who could be expected to give the wisest counsel. That is the role played by the members who carry out the legal aid program. And the right of workers personally or through a special department of their Brotherhood to advise concerning the need for legal assistance — and, most importantly, what lawyer a member could confidently rely on — is an inseparable part of this constitutionally guaranteed right to assist and advise each other.”⁴

The distinction between the classification of lawyer advertising and group communication in regard to First Amendment coverage is also crucial for the related issue of regulating such speech.⁵ In *Virginia State Board of Pharmacy, supra*, 96 S.Ct. at

⁴The ABA Code of Professional Responsibility attributes nonutilization of the legal system to the general public's inability to afford the cost of legal services, its ignorance of the need and value of legal services and the inability of laymen to select dependable counsel. ABA Code of Professional Responsibility (1970), EC 2-1, 2-2 and 2-7, footnotes 3, 17.

⁵Amicus presently is confronted with a proposed Arizona Ethics opinion which has the effect of prohibiting Arizona attorneys from cooperating with groups which indicate to their membership that the fees are “reduced” and the attorneys are “qualified”. Besides the members' basic need to know this information, the primary purpose of a credit union is to develop thrift among its members.

1830-1831, fn. 24, the Court recognized that regulation of commercial speech⁶ is more appropriate than regulation of other varieties of speech.⁷

In contrast, this Court repeatedly has held that “government has no power to restrict expression because of its message, its ideas, its subject matter or its content.” *Virginia State Board of Pharmacy, supra*, 96 S.Ct. at 1817 (Stewart J., concurring). See also *Police Department of Chicago v. Mosely*, 408 U.S. 92, 95 (1972); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975); *Pell v. Procunier*, 417 U.S. 817, 828 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972).⁸

⁶Due to the unique position of lawyers in our society, the regulation of lawyer advertising may be more extensive than other forms of commercial advertising. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975); *Cohen v. Hurley*, 366 U.S. 117, 123-124 (1961); *Note: Commercial Speech — an End in Sight to Chrestensen?*, 23 De Paul L. Rev. 1258, 1273 (1974).

⁷The majority opinion in *Virginia State Board of Pharmacy, supra*, 96 S.Ct. 1830-1831, fn.24, believed commercial speech was more easily “verifiable” and more “durable”. For those reasons, there was less chance that regulation would chill commercial expression. In the group legal service situation, while the group's access to information is substantial, it certainly is different from the commercial advertiser. Additionally, most groups which offer legal service programs are not in the legal service profession and, therefore, group legal service communication is not the *sine qua non* of the group's profit.

⁸Of course, this does not mean that “untruthful” speech has any constitutional protection. See *Virginia State Board of Pharmacy, supra*, 96 S.Ct. at 1830.

Amicus urges that this Court continue to recognize that group legal service communication enjoys a First Amendment protection quite different from the commercial speech of lawyer advertising.

2. Appellee's position always has been that lawyer advertising is a form of speech which enjoys no First Amendment protection. This Court may conclude that a lawyer, being "an officer of the court", is precluded from advertising. See *Cohen, supra*, 366 U.S. at 124, and *Semler v. Dental Examiners*, 294 U.S. 608, 612 (1935). This Court may legitimately find that public information as to the availability and cost of legal services is being significantly increased by group legal service arrangements. The Special Committee, chartered by the American Bar Association to study group legal service plans, found that the available evidence:

"amply show(s) that there has been and continues to be an unmet need for legal services . . . (Moreover,) all of the studies which have been conducted identify unfamiliarity with legal rights, lack of personal contact with a lawyer and the cost (or fear of the cost) of his services as the basic reasons why people fail to seek lawyer's services. To a greater degree than any other device, group arrangements provide a solution to all these problems." Report of the ABA's Special Committee on Availability of

Legal Services, 19 (August 1969).⁹

However, Amicus is concerned that if this Court prohibits lawyer advertising, such a decision could have a negative impact on the ability of groups to communicate effectively with their membership. The four Supreme Court decisions of *Button*, *Trainmen*, *United Mine Workers* and *United Transportation Union, supra*, illustrate the severe obstacles which the organized

⁹It is of interest to note that the Arizona Supreme Court in December, 1976, recognized the need to equalize the opportunity among lawyers to participate in group legal services. The Arizona Supreme Court promulgated the following amendment and addition to the Arizona Code of Professional Responsibility:

DR 2-101(B):

"(6) In communications by a qualified legal assistance organization, along with the biographical information permitted under DR 2-102(A) (6), directed to a member or beneficiary of such organization, or to any individual or group for the purpose of offering to such individual or group the legal services recommended, furnished, or paid for by such organization.

"(7) In communications by any person other than a qualified legal assistance organization which are specifically directed to the officers or other representatives of any bona fide group of 15 or more individuals, along with the biographical information permitted under DR 2-102(A) (6) for the purpose of offering to provide legal services to the members or beneficiaries of such group on the basis of an agreement to be negotiated with such group.

"Provided further, that in communications authorized under subsections (6) and (7) hereof, the terms and conditions upon which such legal services are offered or proposed to be offered may also be included therein."

bar has placed in the path of the development of group legal services.¹⁰

As indicated earlier, the League and its associated credit unions have contracted with a group of attorneys to provide legal services for specific fees. This group fee arrangement was expressly recognized in *United Transportation Union, supra*, 401 U.S. at 584-586.¹¹ The credit unions communicate to their membership that these fees are reduced and that the lawyers are qualified.¹² Certainly, a confirmation of the traditional ban against lawyer advertising should not give justification or incentive for the organized bars to believe that such a prohibition is

¹⁰ Amicus recently opposed an effort by members of the Bar to restrict group legal services to "prepaid" plans, which would have had the effect of prohibiting Amicus' group legal service program. A North Carolina statute prohibits prepaid legal service plans which restrict a person from selecting his own attorney, thereby nullifying the operation of closed panel plans. G.S.N.C. 584-23.1(b) and (e). And Maryland Ethical Opinion No. 77-5 prohibits attorneys from participating in group legal service plans.

¹¹ Even if this Court should determine that price advertising by lawyers is inherently misleading, this Court has held that groups enjoy a constitutional protection in contracting for legal services at a specified price. See *United Transportation Union, supra*, 401 U.S. at 584-586.

¹² As noted earlier, an Arizona proposed ethical opinion would preclude lawyers from cooperating with groups which use the words "reduced" or "qualified" in communicating to their membership. In *Brotherhood of Railroad Trainmen, supra*, 377 U.S. at 5, this Court approved a group of legal service plan which channeled "legal employment to particular lawyers approved by the Brotherhood as legally and morally competent to handle injury claims for members and their families." (Emphasis added)

applicable to the constitutionally protected group legal service plans.¹³

CONCLUSION

The issue of lawyer advertising raises new and difficult problems for the Court in regard to the classification of speech and its proper regulation. Amicus would hope that this Court in its deliberation of lawyer advertising would clearly distinguish it from group legal service communications. The result would be, once again, to make clear to all concerned that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." *United Transportation Union, supra*, 401 U.S. at 585.

¹³ Of course, lawyers cooperating with group legal service plans have the same constitutional protection as the group. In *Brotherhood of Railroad Trainmen, supra*, 377 U.S. at 8, this Court stated: "lawyers accepting employment under this constitutionally protected plan have a like protection which the State cannot abridge."

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